

Interpretation of T.C.A. §§ 3-6-304(j) with respect to the application of the ban on lobbyist campaign contributions to state officials who are candidates for federal or local elected offices, and with respect to candidates for Governor and the General Assembly.

INTRODUCTION

The following Advisory Opinion is in response to a written inquiry from Mr. Bill Mason of Tennessee Citizen Action regarding application of the ban on campaign contributions by lobbyists which is contained in the Ethics Reform Act of 2006 (“Act”).

Mr. Mason asks the following questions: (1) Does the Act apply to contributions by a registered lobbyist to an official, such as a member of the General Assembly or the Governor, who is running for a federal office such as Congress, the U.S. Senate, or President? (2) Does the Act apply to contributions by a registered lobbyist to an official, such as a member of the General Assembly or the Governor, who is running for a county or city office? (3) Is it a violation of the Equal Protection Clause of the U.S. Constitution to, under the Act, allow a lobbyist to contribute to a candidate for a local or federal elected office who is not a member of the General Assembly, but to prohibit such contributions to a candidate in the same contest who is a member of the General Assembly? And (4) In general, does the statute governing campaign contributions by lobbyists apply only to candidates for the General Assembly or Governor, or does the statute govern contributions by lobbyists to any campaigns of individuals who happen to hold a state office?¹

In response to the above questions, the Tennessee Ethics Commission (“Commission”) concludes:

- (1) The Federal Election Campaign Act pre-empts state law with regard to campaign contributions, and thus the prohibition contained in § 3-6-304(j) cannot be applied to contributions to an incumbent legislator or governor that are made in support of their election to a federal office.
- (2) T.C.A. § 3-6-304(j), in conjunction with T.C.A. § 2-10-310, prohibits lobbyist contributions while the General Assembly is in session to an incumbent legislator or governor who is running for a local public office.
- (3) Regarding the applicability of T.C.A. § 3-6-304(j) to lobbyist contributions in support of election to a federal office, see the answer to Question 1, above.
- (4) Contributions to non-incumbent state officials who are running for offices other than Governor or member of the General Assembly are not prohibited by the Act.

BACKGROUND

Mr. Mason is the Executive Director and the registered lobbyist for Tennessee Citizen Action, a grassroots consumer watchdog agency that advocates for a variety of issues, including government reform.

¹ Prior to addressing Mr. Mason’s inquiry, the Tennessee Ethics Commission notes that the authority to make determinations regarding the constitutionality of a state law lies exclusively with the office of the Attorney General and Reporter (“Attorney General”) and state and federal courts. Accordingly, the Commission will not attempt to make such determinations.

DISCUSSION

(1) Does the Act apply to contributions by a registered lobbyist to an official, such as a member of the General Assembly or the Governor, who is running for a federal office such as Congress, the U.S. Senate, or President?

T.C.A. § 3-6-304(j) states:

No lobbyist shall offer or make any campaign contributions, including any in-kind contribution, to or on behalf of the Governor or any member of the General Assembly or any candidate for the office of governor, state senator, or state representative.

The Federal Election Campaign Act, 2 U.S.C.A. § 451 et. seq., regulates all aspects of election to federal office, including limits on campaign contributions, and states at § 453(a) "...the provisions of this Act, and of rules prescribed under this Act, supersede and pre-empt any provision of State law with respect to election to Federal office."

Thus, the Federal Election Campaign Act pre-empts state law with regard to campaign contributions, and the prohibition contained in T.C.A. § 3-6-304(j) cannot be applied to contributions to an incumbent legislator or governor that are made in support of their election to a federal office.

(2) Does the Act apply to contributions by a registered lobbyist to an official, such as a member of the General Assembly or the Governor, who is running for a county or city office?

T.C.A. § 3-6-304 must be read in conjunction with T.C.A. § 2-10-310, which places time limits on contributions to the Governor and members of the General Assembly as follows:

(1) Except as provided in subdivisions (a)(2) and (a)(3), from the convening of the general assembly in organizational session through the earlier of the last day of regular session or June 1 in odd years, and from the convening of the General Assembly in regular session to the earlier of May 15 or the conclusion of the annual session in even years, and from the convening of the General Assembly in any extraordinary session through the conclusion of such extraordinary session, no member of the General Assembly or a member's campaign committee or the Governor or the Governor's campaign committee shall conduct a fundraiser or solicit or accept contributions for the benefit of the caucus, any caucus member or member or candidate of the General Assembly or Governor.

(2) During such period, a member of the General Assembly who is a candidate for a local public office shall be permitted to conduct fundraising events and solicit or accept contributions for such campaign for local public office only under the following conditions:

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It shall be unlawful for any lobbyist or employer of a lobbyist to make any contribution to such member's campaign committee during such period for any purpose.

Accordingly, T.C.A. § 2-10-310(2) prohibits lobbyists from making any campaign contributions to

the Governor and members of the legislature running for a local office while the legislature is in session. In addition, the Attorney General has noted (when determining that the prohibitions contained in T.C.A. § 2-10-310 applied to all state, local and judicial offices), that the purpose of the prohibition is to limit benefits to a member of the General Assembly, not to limit the *type* of campaign that a member can engage in.² This reasoning is equally applicable to T.C.A. § 3-6-304(j), which states simply that *any* campaign contribution to the Governor or a sitting legislator is prohibited. The legislature did not limit this prohibition by specifying only certain types of campaigns, and did not limit it by specifying a time period within which the ban applies. Thus, T.C.A. § 3-6-304(j) includes in its prohibition a ban on lobbyist campaign contributions at any time to the Governor or sitting General Assembly members who are running for local office.

(3) Is it a violation of the Equal Protection Clause of the U.S. Constitution to, under the Act, allow a lobbyist to legally contribute to a candidate for a local or federal elected office who is not a member of the General Assembly, but to prohibit such contribution to a candidate in the same contest who is a member of the General Assembly?

As stated in the answer to Question 1, above, contributions to campaigns for a federal office are pre-empted by federal law and therefore not affected by T.C.A. § 3-6-304(j). The Commission does not have the authority to determine the constitutionality of prohibiting contributions to a legislator or a governor who is a candidate for a local office.

(4) In general, does the statute govern campaign contributions by lobbyists only to candidates for the General Assembly or Governor, or does the statute govern contributions by lobbyists to any campaigns of individuals who happen to hold a state office?

As stated in Question 1, above, state law does not affect campaign contributions for federal elections, regardless of the status of the candidate. Regarding candidacy for other offices, the plain language of T.C.A. § 3-6-304(j) states that lobbyist contributions to the Governor, sitting members of the legislature, *and any candidate for the office of Governor, state senator, or state representative* are prohibited (emphasis added). Accordingly, contributions to other state officials do not appear to be prohibited unless those officials are running for Governor or the General Assembly (for example, lobbyist contributions to a Commissioner of an executive branch agency running for mayor are not prohibited).

CONCLUSION

The Federal Election Campaign Act pre-empts state law with regard to contributions made in support of election to a federal office, and T.C.A. § 3-6-304(j) therefore does not affect such contributions. Lobbyist contributions to an incumbent legislator or governor who is running for local office which are made when the General Assembly is in session, however, is prohibited by T.C.A. § 2-10-310, and the plain language of T.C.A. § 3-6-304(j) appears to require that this ban also be applied when the General Assembly is not in session. In addition, the Commission does not have the authority to determine the constitutionality of the Act's provision which prohibits lobbyist contributions to a legislator or a governor who is a candidate for a local office, but which does not prohibit such contributions to other candidates for the same office. Finally, contributions to non-incumbent state officials who are running for offices other than Governor or member of the General Assembly are not prohibited by the Act.

² Attorney General Opinion No. 97-148 [1997 WL 783046 (Tenn.A.G.)]:

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